TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

FILED JULY 25, 1901.

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

FILED NOVEMBER 23, 1901.

APPEALS FROM THE COURT OF CLAIMS.

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27762—02

1 Court of Claims.

EVETT D. NIX
vs.
UNITED STATES. } No. 20756½.

I.—*Petition and amended petition.*

An original petition of Evett D. Nix was filed April 3, 1897, and numbered on the docket 20756.

Subsequently, to wit, on January 28, 1901, the attorney for the claimant filed the following motion to sever the cause of action, to wit:

"Now comes the claimant by his attorney and moves the court for permission to sever the cause of action in the above-entitled case, and to file two separate petitions: One to cover all items not contested by counsel for the Government; the other to cover the items contested by counsel for the Government; the report of the auditor appointed by the court in this cause showing the items contested and those not contested.

"F. B. CROSTHWAITE,
"*Attorney for Claimant.*"

This motion was allowed by the court January 28, 1901, and thereupon claimant, by his attorney, filed his amended petition covering the items contested by counsel for the Government, which is as follows:

2 EVETT D. NIX
vs.
THE UNITED STATES. } #20756½.

Amended petition.—Filed January 31, 1901.

To the honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, Evett D. Nix, a citizen of the United States, residing at Guthrie, in the Territory of Oklahoma, respectfully represents:

I.

That from July 1, 1893, to February 24, 1896, he was the United States marshal for the district of Oklahoma, duly appointed, qualified, and acting.

II.

That during said period petitioner, as such marshal, performed services, incurred and paid expenses, and made disbursements for and in behalf of the United States, and his accounts therefor, duly verified by his oath, were submitted to the United States court for approval, in the presence of the district attorney, as required by law, and the court approved the same as just and in accordance with law, and the orders of approval were duly entered of record.

III.

Petitioner's said accounts, so approved, were presented to the accounting officers of the Treasury for allowance and payment; part thereof was allowed and paid, but the items set forth in Exhibit A, herewith

attached, amounting to $5,434.95, were disallowed by the account-
3 ing officers and payment of the same was refused, and no part thereof has been paid to your petitioner, or to any one for him.

IV.

No other action than as aforesaid has been had on this claim in Congress or by any Department of the Government.

The petitioner is the sole owner of this claim and the only person interested therein, and no assignment or transfer thereof or of any part or interest therein has been made.

The petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and set-offs, and he believes the facts as stated in his petition to be true.

Wherefore your petitioner prays judgment against the United States for $5,434.95.

EVITT D. NIX,
Petitioner.
F. B. CROSTHWAITE,
Attorney.

EXHIBIT A.

The United States, Dr., to E. D. Nix, late United States marshal for the Territory of Oklahoma, for services performed, expenses incurred and paid, for and in behalf of the United States, from July 1st, 1893, to February 24th, 1896.

FEES AND EXPENSES.

Services performed and expenses paid.

Item 2, $69.18.

1,153 miles, going only to serve warrants of arrest, at $0.06.	$69.18

Item 10, $100.00.

4 Per diems for attendance on court, 20 days, at $5.00.	$100.00

Item 12, $5,135.50.

All charges for transportation of deputies, prisoners, and guards in 218 different cases, disallowed because the prisoners were taken before the commissioner whose office was nearest the place where the crime was committed instead of the commissioner nearest the place of arrest, 50,355 miles, at 10 cts	$5,135.50

Item 16, $39.77.

All charges for service of capias and transportation of deputy, prisoner, and guard	$39.77

Item 24, $90.50.

Actual expense for transporting deputy, prisoner, and guard from Springfield, Ohio. to Kings County penitentiary, at Brooklyn, N. Y	$90.50
Total	$5,434.95

F. B. CROSTHWAITE,
For Claimant.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, on this 1st day of February, 1901, F. B. Crosthwaite, who on oath said that he is the attorney for the petitioner, and is authorized by warrant of attorney to verify the foregoing amended petition; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

[SEAL.] EDWARD F. COLLADAY,
Commissioner of the Court of Claims.

5 *Traverse of amended petition.—Filed Jan'y 31, 1901.*

EVETT D. NIX
vs.
UNITED STATES. } No. 20756½.

And now comes the Attorney-General on behalf of the United States, and, answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the said amended petition be dismissed.

L. A. PRADT,
Assistant Atty. General.

6 *Findings of fact and conclusion of law.—Filed June 3, 1901.*

EVETT D. NIX
v.
THE UNITED STATES. }

This case having been heard by the Court of Claims, the court, upon the evidence and the report of the auditor, makes the following

FINDINGS OF FACT.

I.

The claimant, Evett D. Nix, was United States marshal for the district of Oklahoma from July 1, 1893, to February 24, 1896, duly appointed, qualified, and acting.

II.

During said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, but a part thereof, as more specifically set forth in Finding III, was disallowed, and no portion thereof has been paid to the claimant.

III.

Item 2. To travel, 1,153 miles in going to serve warrants of arrest, at six cents per mile, $69.18, being for travel in excess of the distance from the

place of arrest to the place of receiving writs. The travel charged for was in a new and unsettled Indian country, without post-offices,
7 post routes, or section lines. The defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route. The deputies had to find fordable places to cross the river to locate the defendants, there being no bridges. After arrest the defendants were taken by the most direct routes to commissioners for examination.

Item 10. For attendance of the marshal at court, by deputy, for twenty days, at $5 per day, $100.00.

It does not appear whether business was transacted in the court on said days although the court was opened for business by order of the judge. It does not appear that the judge was present at court on any of these days.

Item 12. For transportation of prisoners (deputy and prisoner or deputy, prisoner, and guard) in bringing them from the several places of arrest for a hearing before United States commissioners whose offices were nearest the places where the crimes were committed by the prisoners instead of bringing the prisoners before the commissioners whose offices were nearest to the places of arrest, $1,143.30.

Item 16. For service of a capias and transportation (mileage) of a deputy, prisoner, and guard. The capias was issued by the clerk of the U. S. district court at Topeka, Kansas, on an indictment found by the grand jury at Topeka. The capias was received by the claimant in Oklahoma City and was executed by arresting the prisoner named in the capias who was transported to the U. S. district court at Wichita, Kansas.

The claimant charged six cents a mile for going sixty-two miles, from Oklahoma City to Perry, to serve the writ, $2.00 for the service of the writ, and ten cents per mile each for the deputy, prisoner, and guard for 111 miles, $33.30, from Perry, Oklahoma, to Witchita, Kansas, and one meal for the prisoner, 75 cents, making a total of $39.77.

8 Item 24. For actual expenses for transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant of commitment. The warrant of commitment was issued at Oklahoma and the marshal transported the prisoner on that warrant to Springfield, Ohio, where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged as a witness in that case at Springfield the marshal continued his transportation from Springfield to New York City on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York City too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. The marshal made every effort to retake the prisoner and failed, $90.50.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States

in the sum of one hundred and eight dollars and ninety-five cents ($108.95) on items 2 and 16 of Finding III.

All other items disallowed.

BY THE COURT.

9 *Judgment of the court.*

EVETT D. NIX
vs.
THE UNITED STATES. } No. 20756½.

At a Court of Claims held in the city of Washington on the 3d day of June, 1901, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the claimant, Evett D. Nix, do have and recover of and from the United States the sum of one hundred and eight dollars and ninety-five cents ($108\frac{95}{100}$).

BY THE COURT.

10 *Application of claimant for and allowance of appeal.*

EVETT D. NIX
vs.
UNITED STATES. } No. 20756½.

From the judgment rendered in the above-entitled cause on the third day of June, 1901, the claimant, by his attorney of record, on the 10th day of June, 1901, makes application for and gives notice of an appeal to the Supreme Court of the United States.

F. B. CROSTHWAITE,
Attorney for Claimant.

Filed June 10, 1901.
Allowed.

C. C. NOTT,
Chief Justice.

11 *Application of defendants for and allowance of appeal.*

EVETT D. NIX
v.
UNITED STATES. } No. 20756½.

From the judgment rendered in the above-entitled cause on the 3d day of June, 1901, in favor of the claimant, the defendants, by their Attorney-General, on the 27th day of June, 1901, make application for and give notice of an appeal to the Supreme Court of the United States.

LEWIS A. PRADT,
Assistant Atty. General.

Filed June 27, 1901.
Allowed.

C. C. NOTT,
Chief Justice.

12 In the Court of Claims.

EVETT D. NIX
vs.
UNITED STATES. } No. 20756½.

I certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact and conclusion of law, of the judgment of the court, of the application of the claimant and also of the defendant for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Nott.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 16th day of July, A. D. 1901.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) File No., 18235. Court of Claims. Term No., 142. The United States vs. Appellant, Evett D. Nix. Filed July 25, 1901, and file No., 18326. Term No., 195. Evett D. Nix vs. Appellant, The United States. Filed November 23rd, 1901. Office Supreme Court of U. S. Received July 24, 1901.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 142,

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX,

and

No. 195,

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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11438—02

1 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the Court of Claims, greeting:

Whereas in a certain suit in said Court of Claims between Evett D. Nix, claimant, and the United States, defendant, which suit was removed to the Supreme Court of the United States, by virtue of an appeal and cross-appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The claimant's request for findings of fact, of record in the Court of Claims, is omitted from the transcript."

You, therefore, are hereby commanded that, searching the record
2 and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of November, A. D. 1902.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

3 (Indorsed:) Court of Claims. Let the claimant's request for findings of fact be certified to the Supreme Court in compliance with the within mandate. Charles C. Nott, chief justice. November 19, 1902.

4 In the United States Court of Claims.

EVETT D. NIX,
vs.
THE UNITED STATES. } No. 20756–1/2.

CLAIMANT'S REQUEST FOR FINDINGS OF FACT.

(Filed January 31, 1901. J. R.)

The claimant, considering the facts hereinafter set forth as proved and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

I.

The claimant, Evett D. Nix, was United States marshal for the district of Oklahoma from July 1, 1893, to February 24, 1896, duly appointed, qualified, and acting.

II.

That during said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court, in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof were

allowed and paid, but part thereof, as more specifically set forth in Finding III, amounting to $5,434.95, were disallowed, and no part thereof has been paid to the claimant.

5 III.

The items so disallowed by the accounting officers are as follows:

ITEM 2.

1,153 miles' travel, going only to serve warrants of arrest, at 6 cents per mile..... $69.18

The claimant charged in his accounts the 6 cents per mile for going to serve a warrant of arrest, and computed the distance from the place where the warrant was received to the place where the arrest was made, and, in each instance, the distance was greater than from the place of arrest to the place where the writ was returned, on which grounds the accounting officers disallowed the charges. The claimant found it necessary to make circuitous routes, as the defendants for whom he had warrants of arrest were moving from place to place to avoid arrest, and in other cases involved under this item the deputies had to find fordable places to cross the rivers, there being no bridges. The travel charged for was actually and necessarily performed.

ITEM 10.

Per diems for attendance on court, 20 days, at $5.00 per day.. 100.00

The claimant charged in his accounts for attendance by a deputy on court on each of 20 days, at $5 per day. A certificate from the deputy and from the clerk of the
6 court was filed with the claimant's accounts, showing that the court was actually opened for business on the dates specified by order of the court, and that the deputy for whom the charges were made and the bailiffs of the court were in attendance on the dates charged for.

The accounting officers disallowed the charges on the ground that there was no business transacted in the court on the days charged for.

ITEM 12.

All charges for transportation of deputies, prisoners, and guards in 218 different cases..... 5,135.50

The claimant transported prisoners and guards, in 218 different cases, a total of 51,355 miles, and charged 10 cents per mile for the transportation.

After the claimant made the arrests the prisoners were taken to the United States commissioner whose office was nearest to the place where the crime was committed.

The accounting officers disallowed these charges on the ground that the prisoners should have been taken before the United States commissioner nearest the place where the arrest was made.

The claimant took the prisoners before the commissioner

nearest the place where the crime was committed, pursuant to the provisions of the act of Congress entitled "An act to provide a temporary government for the Territory of Oklahoma, approved May the 2nd, 1890 (26 Stats. at Large, 87, sec.
7 10), which reads as follows: "Persons charged with any offense or crime in the Territory of Oklahoma, and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies, wherever found in said Territory, but in all such cases the accused shall be taken for preliminary examination before a United States commissioner or a justice of the peace whose office is nearest to the place where the offense or crime was committed.

"All offenses committed in said Territory, if committed within an organized county, shall be prosecuted and tried within said county * * *."

An action was brought in the district court for the Territory of Oklahoma to quash the information in a case where the defendant was taken to the commissioner nearest the place where the arrest was made, and the court, in its decision quashing the information in effect, held that the provisions of the said act approved May 2nd, 1890, were in force in Oklahoma, and that the defendant should have been taken to the commissioner whose office was nearest the place where the crime was committed.

The accounting officers disallowed the items under the provisions of the act of August 18th, 1894, which provides "that it shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offense to take the defendant before the nearest circuit court
8 commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint * * *, and no mileage shall be allowed any officer violating the provisions hereof." (28 Stats. at Large, p. 416.) The prisoners were actually transported as charged, and the services of the guards which were used were necessary.

ITEM 16.

All charges for service of a capias and transportation of a deputy, prisoner, and guard..... $39.77

The claimant charged in his accounts 6 cents a mile for going 62 miles to serve the writ, $2.00 for the service of the writ, and 10 cents per mile for each of the deputy, prisoner, and guard for 111 miles, $33.30, and one meal for the prisoner, 75 cents, making a total of $39.77.

These charges were made for services performed upon a capias issued by the clerk of the district court at Topeka, Kansas, on an indictment found by the grand jury at Topeka, Kansas, and received by the claimant in Oklahoma City and executed by arresting the person named in the capias, who was transported to the United States court in Kansas.

The accounting officers disallowed the charges because
9 the capias was not approved by the judge of the court.

ITEM 24.

Actual expenses incurred in transporting a deputy, one prisoner, and one guard from Springfield, Ohio, to Brooklyn, New York $90.50

The claimant was transporting a prisoner from Guthrie, Oklahoma, to the Kings County penitentiary, at Brooklyn, New York, under sentence of the court. Previous to starting on the trip the claimant received a subpœna for the prisoner to give testimony on behalf of the Government, in a counterfeiting case before a United States commissioner at Springfield, Ohio, to which place the claimant transported the prisoner.

After the prisoner's testimony had been taken he was transported from Springfield, Ohio, to New York City, arriving there too late to be delivered to the penitentiary.

While the claimant was going into the dining room with the prisoner for supper he escaped through a side door of the hotel, and the claimant could not recapture him after diligent efforts.

All of the expense items are covered by vouchers on file at the Department.

The accounting officers disallowed these charges because the prisoner escaped and was not delivered to the penitentiary.

Total 5,434.95

10 CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court is asked to decide, as a conclusion of law, that the claimant, Evett D. Nix, is entitled to recover judgment against the United States in the sum of $5,434.95.

(Sgd.) F. B. CROSTHWAITE,
For Claimant.

Court of Claims.

EVETT D. NIX
v.
UNITED STATES. } No. 20756½.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing is a true and complete copy of the claimant's request for findings of fact in the above-entitled cause, filed January 31, 1901.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 20th day of November, A. D. 1902.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

11 Indorsed: File Nos. 18235, 18326, Supreme Court U.. S., October term, 1902. Term Nos. 142 and 195. U. S. vs. Nix, and Nix vs. U. S. Writ of certiorari and return. Filed Nov. 21, 1902.

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1 In the Court of Claims of the United States.

EVETT D. NIX
v.
THE UNITED STATES. } No. 20756½.

In obedience to the order of the Supreme Court of the United States, passed in the following cases, to wit: The United States, appellant, *v.* Evett D. Nix, and Evett D. Nix, appellant, *v.* United States, October term, 1902, and numbered on the dockets of said court as Nos. 142 and 195, it is, this 22nd day of January, 1903,

Ordered, that item 12, finding 3, be revised as follows:

This item was charged in claimant's accounts as transportation of prisoners, deputies, and guards from the several places of arrest, for hearing before the United States commissioners whose offices were nearest the places where the crimes for which the prisoners were arrested were committed. The number of miles charged in claimant's accounts for this travel was fifty-one thousand three hundred and fifty-five miles, at ten cents a mile, amounting to five thousand one hundred and thirty-five dollars and fifty cents.

Those accounts were submitted to the United States district court for Oklahoma under the provisions of the act of February 22, 1875, 18 Stats., 333, and the said accounts, including this item as above charged, were approved by that court. When the accounts so approved were submitted to the accounting officers, all the charges for travel included in that item were disallowed by them uuder the provisions of the sundry civil appropriation act of August 18, 1894, 28 Stats., 372–416, which made it the duty of the marshal to take the defendants before the
2 nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial. Subsequently the accounting officers allowed and paid claimant, of this item, twenty-seven dollars.

After suit was brought in this court, the claimant's deposition was taken in respect to this item, and he proved that, of his own knowledge, eleven thousand four hundred and thirty-three miles were traveled in the transportation of said prisoners, deputies, and guards. As to the remainder of the travel, he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the Territory and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. No other evidence was offered by the claimant to establish the number of miles actually traveled than the approval of the district court for Oklahoma and his own deposition subsequently taken, as above stated. If the approval of his account by said district court is competent evidence to establish the number of miles actually traveled, this court finds the ultimate fact that he traveled 51,355 miles. If such approval of the district court is incompetent to establish the number of miles actually traveled, this court finds that the number of miles so traveled was 11,433 in the transportation of prisoners, deputies, and guards, as before set forth.

3 Ordered this 22d day of January, 1903, that the foregoing revised findings of fact be certified and transmitted to the Supreme

Court of the United States pursuant to the order of that court made the 19th day of January, 1903.

By the court:

CHARLES C. NOTT,
Chief Justice.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed:) File Nos. 18235 and 18236. Supreme Court U. S. October term, 1902. Term Nos., 142 and 195. The United States, appt., vs. Evett D. Nix, and Evett D. Nix, appt., vs. The United States. Revised finding of Court of Claims. Filed Jan. 23d, 1903.

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16587

IN THE

Supreme Court of the United States.

October Term, 1902.

THE UNITED STATES, Appellant, *vs.* EVETT D. NIX.	No. 142.
EVETT D. NIX, Appellant, *vs.* THE UNITED STATES.	No. 195.

Comes now the said Evett D. Nix, by Frank B. Crosthwaite and Franklin H. Mackey, his counsel, and suggests diminution of the record in this cause, in this, to wit:

1. The Claimant's Request for Findings of Fact, of record in the Court of Claims, is omitted from the transcript.

Wherefore, the said Evett D. Nix moves the Court, under rule 14, to award a writ of *certiorari* to be issued

and directed to the judges of said Court of Claims, commanding that, searching the record and proceedings in said cause, they forthwith certify to this Court that part of the said record so omitted as aforesaid.

This motion is made for the reason that the Findings of the Court of Claims do not show the amount in controversy in this cause. The Claimant's Request for Findings of Fact in the Court below do, however, show the full amount in controversy. That is to say, they show that the claimant requested the Court below to find that his account of $5,434.95 was duly approved by the Territorial Court of Oklahoma. The Court, however, while finding that the account was duly approved, failed to state the amount which was thus approved. The claimant contends that the account so approved is *prima facie* evidence of the correctness of the items in the account, and in the absence of clear and unequivocal proof of mistake on the part of the Court is conclusive.

Jones *vs.* United States, 134th U. S., 483, 488.

It becomes important, therefore, to show the amount for which the account was approved by the Oklahoma court, and inasmuch as the amount for which the account was approved exceeds $5,000, that approval establishes the amount in controversy in this cause, and establishes the jurisdiction of this Court to hear the cause.

In the United States *vs.* Adams, 9th Wall., 661, the *writ of certiorari* was pointed out as the proper writ "to brig up to the court of error, on an allegation of diminu-

tion of out branches of the record or other documents, and writings in the court below, which have not been previously certified or sent."

F. B. CROSTHWAITE,
FRANKLIN H. MACKEY,
Of Counsel.

November 12, 1902.

I admit the matters of fact contained in the above motion, of which I hereby acknowledge service this 11th day of November, 1902.

L. A. PRATT,
Assistant Attorney General,
Of Counsel for Defense.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 142,

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX,

and

No. 195,

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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11438—02

1 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the Court of Claims, greeting:

Whereas in a certain suit in said Court of Claims between Evett D. Nix, claimant, and the United States, defendant, which suit was removed to the Supreme Court of the United States, by virtue of an appeal and cross-appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The claimant's request for findings of fact, of record in the Court of Claims, is omitted from the transcript."

You, therefore, are hereby commanded that, searching the record
2 and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of November, A. D. 1902.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

3 (Indorsed:) Court of Claims. Let the claimant's request for findings of fact be certified to the Supreme Court in compliance with the within mandate. Charles C. Nott, chief justice. November 19, 1902.

4 In the United States Court of Claims.

EVETT D. NIX,
vs.
THE UNITED STATES. } No. 20756–1/2.

CLAIMANT'S REQUEST FOR FINDINGS OF FACT.

(Filed January 31, 1901. J. R.)

The claimant, considering the facts hereinafter set forth as proved and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

I.

The claimant, Evett D. Nix, was United States marshal for the district of Oklahoma from July 1, 1893, to February 24, 1896, duly appointed, qualified, and acting.

II.

That during said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court, in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof were

allowed and paid, but part thereof, as more specifically set forth in Finding III, amounting to $5,434.95, were disallowed, and no part thereof has been paid to the claimant.

5 III.

The items so disallowed by the accounting officers are as follows:

ITEM 2.

1,153 miles' travel, going only to serve warrants of arrest, at 6 cents per mile..... $69.18

The claimant charged in his accounts the 6 cents per mile for going to serve a warrant of arrest, and computed the distance from the place where the warrant was received to the place where the arrest was made, and, in each instance, the distance was greater than from the place of arrest to the place where the writ was returned, on which grounds the accounting officers disallowed the charges. The claimant found it necessary to make circuitous routes, as the defendants for whom he had warrants of arrest were moving from place to place to avoid arrest, and in other cases involved under this item the deputies had to find fordable places to cross the rivers, there being no bridges. The travel charged for was actually and necessarily performed.

ITEM 10.

Per diems for attendance on court, 20 days, at $5.00 per day.. 100.00

The claimant charged in his accounts for attendance by a deputy on court on each of 20 days, at $5 per day. A certificate from the deputy and from the clerk of the
6 court was filed with the claimant's accounts, showing that the court was actually opened for business on the dates specified by order of the court, and that the deputy for whom the charges were made and the bailiffs of the court were in attendance on the dates charged for.

The accounting officers disallowed the charges on the ground that there was no business transacted in the court on the days charged for.

ITEM 12.

All charges for transportation of deputies, prisoners, and guards in 218 different cases..... 5,135.50

The claimant transported prisoners and guards, in 218 different cases, a total of 51,355 miles, and charged 10 cents per mile for the transportation.

After the claimant made the arrests the prisoners were taken to the United States commissioner whose office was nearest to the place where the crime was committed.

The accounting officers disallowed these charges on the ground that the prisoners should have been taken before the United States commissioner nearest the place where the arrest was made.

The claimant took the prisoners before the commissioner

nearest the place where the crime was committed, pursuant to the provisions of the act of Congress entitled "An act to provide a temporary government for the Territory of Oklahoma, approved May the 2nd, 1890 (26 Stats. at Large, 87, sec.
7 10), which reads as follows: "Persons charged with any offense or crime in the Territory of Oklahoma, and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies, wherever found in said Territory, but in all such cases the accused shall be taken for preliminary examination before a United States commissioner or a justice of the peace whose office is nearest to the place where the offense or crime was committed.

"All offenses committed in said Territory, if committed within an organized county, shall be prosecuted and tried within said county * * *."

An action was brought in the district court for the Territory of Oklahoma to quash the information in a case where the defendant was taken to the commissioner nearest the place where the arrest was made, and the court, in its decision quashing the information in effect, held that the provisions of the said act approved May 2nd, 1890, were in force in Oklahoma, and that the defendant should have been taken to the commissioner whose office was nearest the place where the crime was committed.

The accounting officers disallowed the items under the provisions of the act of August 18th, 1894, which provides "that it shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offense to take the defendant before the nearest circuit court
8 commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint * * *, and no mileage shall be allowed any officer violating the provisions hereof." (28 Stats. at Large, p. 416.) The prisoners were actually transported as charged, and the services of the guards which were used were necessary.

ITEM 16.

All charges for service of a capias and transportation of a deputy, prisoner, and guard..... $39.77

The claimant charged in his accounts 6 cents a mile for going 62 miles to serve the writ, $2.00 for the service of the writ, and 10 cents per mile for each of the deputy, prisoner, and guard for 111 miles, $33.30, and one meal for the prisoner, 75 cents, making a total of $39.77.

These charges were made for services performed upon a capias issued by the clerk of the district court at Topeka, Kansas, on an indictment found by the grand jury at Topeka, Kansas, and received by the claimant in Oklahoma City and executed by arresting the person named in the capias, who was transported to the United States court in Kansas.

The accounting officers disallowed the charges because
9 the capias was not approved by the judge of the court.

ITEM 24.

Actual expenses incurred in transporting a deputy, one prisoner, and one guard from Springfield, Ohio, to Brooklyn, New York $90.50

The claimant was transporting a prisoner from Guthrie, Oklahoma, to the Kings County penitentiary, at Brooklyn, New York, under sentence of the court. Previous to starting on the trip the claimant received a subpœna for the prisoner to give testimony on behalf of the Government, in a counterfeiting case before a United States commissioner at Springfield, Ohio, to which place the claimant transported the prisoner.

After the prisoner's testimony had been taken he was transported from Springfield, Ohio, to New York City, arriving there too late to be delivered to the penitentiary.

While the claimant was going into the dining room with the prisoner for supper he escaped through a side door of the hotel, and the claimant could not recapture him after diligent efforts.

All of the expense items are covered by vouchers on file at the Department.

The accounting officers disallowed these charges because the prisoner escaped and was not delivered to the penitentiary.

Total 5,434.95

10 CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court is asked to decide, as a conclusion of law, that the claimant, Evett D. Nix, is entitled to recover judgment against the United States in the sum of $5,434.95.

(Sgd.) F. B. CROSTHWAITE,
For Claimant.

Court of Claims.

EVETT D. NIX
v.
UNITED STATES. } No. 20756½.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing is a true and complete copy of the claimant's request for findings of fact in the above-entitled cause, filed January 31, 1901.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 20th day of November, A. D. 1902.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

11 Indorsed: File Nos. 18235, 18326, Supreme Court U. S., October term, 1902. Term Nos. 142 and 195. U. S. vs. Nix, and Nix vs. U. S. Writ of certiorari and return. Filed Nov. 21, 1902.

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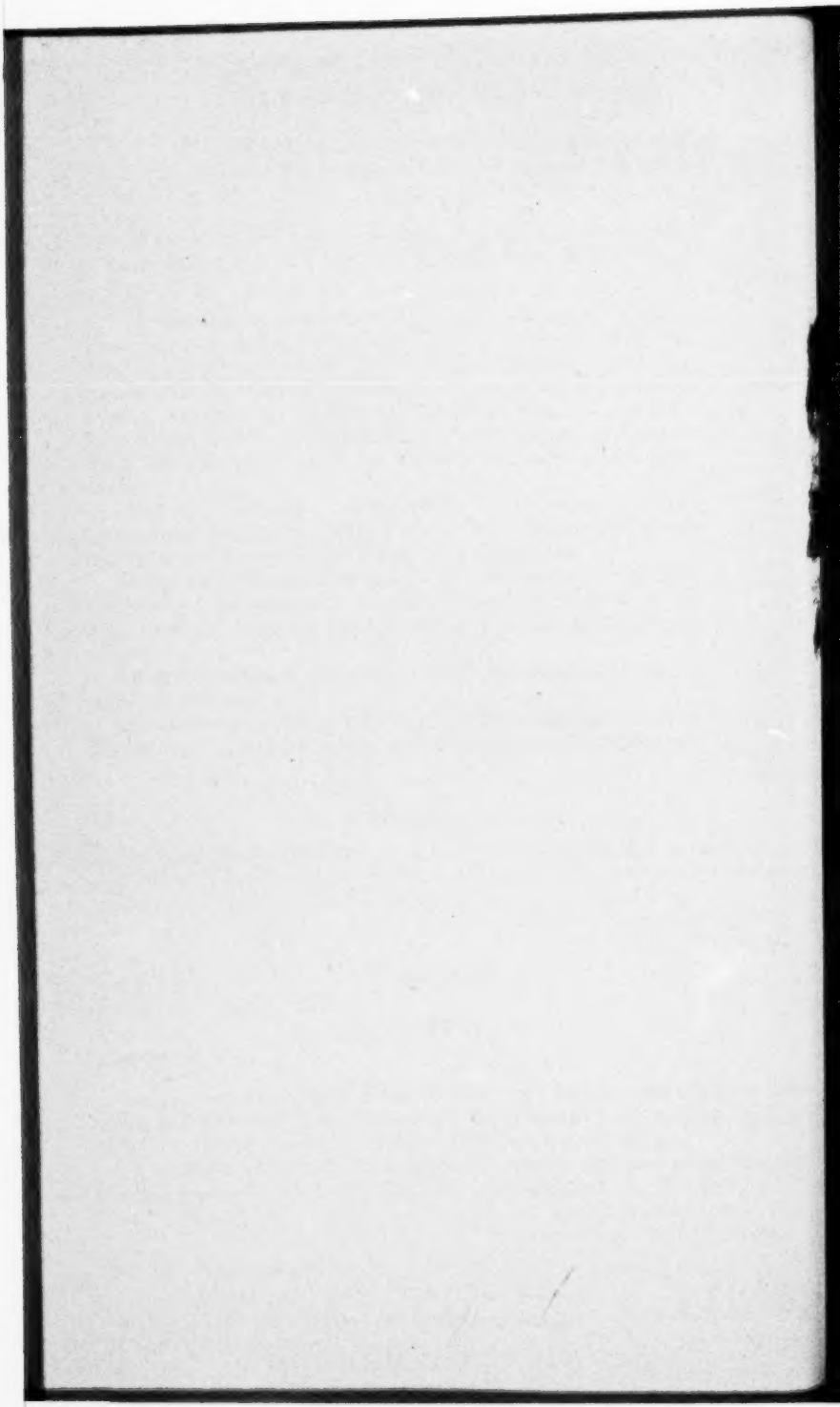

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FILED
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX,

and

No. 195,

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

REVISED FINDINGS OF FACTS OF THE COURT OF CLAIMS.

FILED JANUARY 23, 1903.

(18235.)
(18236.)

1 In the Court of Claims of the United States.

EVETT D. NIX
v.
THE UNITED STATES. } No. 20756½.

In obedience to the order of the Supreme Court of the United States, passed in the following cases, to wit: The United States, appellant, *v.* Evett D. Nix, and Evett D. Nix, appellant, *v.* United States, October term, 1902, and numbered on the dockets of said court as Nos. 142 and 195, it is, this 22nd day of January, 1903,

Ordered, that item 12, finding 3, be revised as follows:

This item was charged in claimant's accounts as transportation of prisoners, deputies, and guards from the several places of arrest, for hearing before the United States commissioners whose offices were nearest the places where the crimes for which the prisoners were arrested were committed. The number of miles charged in claimant's accounts for this travel was fifty-one thousand three hundred and fifty-five miles, at ten cents a mile, amounting to five thousand one hundred and thirty-five dollars and fifty cents.

Those accounts were submitted to the United States district court for Oklahoma under the provisions of the act of February 22, 1875, 18 Stats., 333, and the said accounts, including this item as above charged, were approved by that court. When the accounts so approved were submitted to the accounting officers, all the charges for travel included in that item were disallowed by them uuder the provisions of the sundry civil appropriation act of August 18, 1894, 28 Stats., 372–416, which made it the duty of the marshal to take the defendants before the
2 nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial. Subsequently the accounting officers allowed and paid claimant, of this item, twenty-seven dollars.

After suit was brought in this court, the claimant's deposition was taken in respect to this item, and he proved that, of his own knowledge, eleven thousand four hundred and thirty-three miles were traveled in the transportation of said prisoners, deputies, and guards. As to the remainder of the travel, he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the Territory and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. No other evidence was offered by the claimant to establish the number of miles actually traveled than the approval of the district court for Oklahoma and his own deposition subsequently taken, as above stated. If the approval of his account by said district court is competent evidence to establish the number of miles actually traveled, this court finds the ultimate fact that he traveled 51,355 miles. If such approval of the district court is incompetent to establish the number of miles actually traveled, this court finds that the number of miles so traveled was 11,433 in the transportation of prisoners, deputies, and guards, as before set forth.

3 Ordered this 22d day of January, 1903, that the foregoing revised findings of fact be certified and transmitted to the Supreme

Court of the United States pursuant to the order of that court made the 19th day of January, 1903.

By the court:

CHARLES C. NOTT,
Chief Justice.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed:) File Nos. 18235 and 18236. Supreme Court U. S. October term, 1902. Term Nos., 142 and 195. The United States, appt., vs. Evett D. Nix, and Evett D. Nix, appt., vs. The United States. Revised finding of Court of Claims. Filed Jan. 23d, 1903.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
EVETT D. NIX. } No. 142.

EVETT D. NIX, APPELLANT,
v.
THE UNITED STATES. } No. 195.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The items in dispute on these appeals are set forth in the record, and as we have admitted on the motion for the writ of *certiorari* the facts therein stated we will not discuss the question of jurisdiction of the cross-appeal.

APPEAL No. 142.

Item 2,—$69.18 (R., 3).

The court below erred in its conclusion of law and judgment in favor of the claimant for item 2 of the findings of fact (Rec., 4 and 5). The charge in that

item is for travel in going to serve warrants of arrests, 1,153 miles, at 6 cents per mile, $69.18, that travel being in excess of the distance from the place of arrest to the place of receiving writs. The fee bill for marshals, section 829, Revised Statutes (Rev. Stat., p. 157), provides the following fee:

> For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service. * * *

This clause of the fee bill allows nothing for travel in excess of that distance, however necessary a greater distance of travel may be. The mileage is to be computed not for the distance which the marshal might find it necessary to travel in going to serve the process, but is "to be computed from the place where the process is returned to the place of service." In the old practice, the mileage fee for travel was generally for the same distance, whether it was computed from the place of arrest to the place of the return of the writ or whether it was computed from the place of receiving the writ to the place of service, because the writs were usually received by the marshal at the place where they were to be returned. But in the case at bar the prisoners were taken by the most direct routes from the places where the warrants of arrest were served to the nearest commissioners for examination. For that travel we necessarily assume, from the finding of the court below, that the marshal has been allowed

by the accounting officers the statutory fee for that distance, because the travel charged for in this item is said to be "in excess of the distance from the place of arrest to the place of receiving writs." The words quoted are in Finding III (R., 3), and they probably refer to the old practice where warrants were issued by commissioners of the circuit courts and made returnable to their own offices—a practice which has been changed by the statutes referred to under item 12, *post*. The change of practice may sometimes make the statutory mileage fee less than the expense of travel, but the last clause of section 829 R. S. provides that—

> In all cases where mileage is allowed to the marshal, he may elect to receive the same, or his actual traveling expenses, to be proved on his oath to the satisfaction of the court.

And he has another remedy in section 846, when he incurs "extraordinary expenses in executing the laws" of the United States.

THE CROSS APPEAL NO. 195.

Item 10,—$100 (R., 4).

This is a charge of $5 per day for twenty days for the attendance of the marshal at court by deputy. This item was disallowed by the court below. The fee bill (sec. 829, Rev. Stat.) allows the marshal for attending the circuit and district courts, when both or either are in session, $5 per diem during the term. The act of March 3, 1887 (24 Stats., 509, 541, c. 362;

Supp. R. S., vol. 1, 2d ed., p. 564), changed that clause of the fee bill as follows:

> Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal, for attendance in court, except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts.

The finding of the court below on this item does not show that the facts were so certified. Compliance with that statutory rule can not perhaps be presumed by the approval of the account of the marshal by the local judge under the act of February 22, 1875 (18 Stats. 223; Supp. Rev. Stats., vol. 1, p. 61). But as this court had decided the main question in *United States* v. *Pitman* (147 U. S. 669) under the same provision of the act of March 3, 1887, we did not contest this item in the court below and do not do so now. (*United States* v. *Finnell*, 185 U. S., 236.)

Item 12,—$5,135.50 (R. 4; and Cross Appeal No. 195, R. 2).

This is a charge of fees for transportation of prisoners, deputies, and guards within the marshal's judicial district under warrants or process of arrest, from the places of arrest to the places where the writs were returned. This item was disallowed by the court

below and by the accounting officers under construction of the act of August 18, 1894 (28 Stats., pp. 372–416), which provides as follows:

> That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendants before the nearest circuit court commissioner or the nearest judical officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

Under the fee bill (sec. 829, Rev. Stats.) the marshal was allowed mileage for going only in serving process, warrants, etc., 6 cents a mile, to be computed from the place where the process was returned to the place of service (as stated under Item 2, *supra*), and also for the transportation of criminals, 10 cents per mile for himself, each prisoner, and necessary guard. In such cases the mileage of the marshal for the transportation of prisoners, etc., was to be computed from the place where the process was served to the place where it was returned. The above statute changes the measure of compensation by requiring the marshal, when he arrests a prisoner, to take him

before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction for a hearing, commitment, or taking of bail for trial. Instead of doing this the marshal brought the prisoners before United States commissioners whose offices were nearest the places where the crimes for which they were respectively arrested were committed.

This action of the marshal is attempted to be justified under the provisions of the act entitled "An act to provide a temporary government for the Territory of Oklahoma * * * ," approved May 2, 1890 (26 Stats., 81). Section 10 of that act, which is partly set forth in the brief for the cross-appellant, requires the United States marshal, or his deputies, to bring parties arrested for any offense or crime in the Territory before a United States commissioner or a justice of the peace of the county whose office is nearest to the place where the offense or crime was committed.

It is contended by the learned counsel on the other side that the section of the organic act above cited governs the marshal's duties and fees in serving process of arrest in the Territory on persons charged with offenses or crimes against the United States. Our contention is that it relates only to offenses or crimes against the Territory. Therefore we contend that there is no conflict between the said act of August 18, 1894, and the act of May 2, 1890, above cited. The former act had relation to the duties of marshals in serving process for the arrest of persons charged with criminal offenses against the United States. The act of May 2, 1890,

had reference to offenses and crimes committed against the Territory of Oklahoma, and therefore it did not attempt to change the general law as to the duties of marshals. By the laws passed at the first legislative assembly of the Territory in relation to criminal procedure it was enacted that "A criminal action is prosecuted in the name of the Territory of Oklahoma as a party against the person charged with the offense." (Statutes of Oklahoma 1890, ch. 72 (3507), sec. 17.) The organic act established a temporary government, and, of course, until the county officers provided for in sections 9 and 11 were appointed or elected, there would be no officer to serve process for the Territory except the United States marshal. Therefore, naturally, Congress required the marshal to serve all such process until sheriffs could be appointed or elected and qualified in the various counties of the Territory. In effect the marshal was made for the time being the sheriff for each county in the Territory, and as such acting sheriff he was, of course, required by the organic act to bring prisoners arrested for offenses against the Territory before a United States commissioner or a justice of the peace whose office was nearest to the place where the offense or crime charged against the prisoner was committed. Until justices of the peace were appointed or elected in each county, of course, the United States commissioner had jurisdiction under the organic act. The two acts above cited can not be construed as in conflict with each other, because each act was passed for

a different purpose; hence it is unnecessary to discuss the question of the repeal of the former act by the latter act, or of conflict between their provisions.

Section 13 of said act of May 2, 1890, provides that a marshal shall be appointed for said Territory "who shall execute all process issued from the said courts when exercising their jurisdiction as circuit and district courts of the United States," and that he shall be allowed "the same fees as are prescribed for similar services" rendered by United States marshals in chapter 16, title Judiciary, of the Revised Statutes of the United States. And section 28 extends the Constitution and laws of the United States, not locally inapplicable, except so far as modified by this act, to the Territory of Oklahoma. This, by inference, extends all subsequent applicable acts of Congress to that Territory.

The legislation in this organic act is the fundamental law of the local government; and the relation of the Territory to the General Government is much the same as that which counties bear to their respective States; hence Congress has legislated for the Territory as a State does for a municipal organization, and this kind of legislation includes subjects upon which Congress has not power to legislate for States, as, for example, service of State court process. If others are included, the subjects are easily distinguished. (*National Bank* v. *County of Yankton*, 101 U. S., 129, 133; *Mormon Church* v. *United States*, 136 U. S., 42, 44.)

In the case at bar the marshal made a mistake in

his construction of the organic act of May 2, 1890, instead of complying with the requirements of the general act of August 18, 1894, therefore the court below disallowed this item.

In regard to the point attempted to be made in the brief on the other side, viz, that there has been no "circuit court commissioner" in the district of Oklahoma since the act of May 2, 1890, the answer is that the terms "circuit court commissioner" and "United States commissioner" were at that time synonymous titles for the same office or officer, whose statutory title was "commissioner of the circuit court." For example, in the act of February 22, 1875, above cited, upon which counsel relies for prima facie proof of the various items of the accounts in suit (*United States* v. *Jones*, 134 U. S., 483, 488; and *United States* v. *Harmon*, 147 U. S., 268, 282), commissioners who were appointed by the United States circuit courts under section 627 of the Revised Statutes are called "United States commissioners," and by the act of May 28, 1896, chapter 252 (29 Stats., 184), which abolished the office of "commissioner of the circuit court" (R. S., sec. 627) and created the like office of commissioner of the United States, the laws relating to the former office were made applicable to the latter office.

APPEAL NO. 142.

Item 24,—$90.50 (R. 4).

This item was properly disallowed by the court below. The paragraph of the fee bill above cited (R. S. § 829),

which allows the marshal actual expenses incurred in the transportation of criminals who were convicted in districts where there was no available penitentiary and sent to a prison in another district, does not authorize any fee or reimbursement of expenses where the prisoner is not transported to the designated prison. In this case the prisoner escaped from the custody of the deputy marshal, and there does not appear to be any law authorizing the reimbursement of the marshal's expenses in such cases.

Respectfully submitted.

FELIX BRANNIGAN,
Assistant Attorney.

L. A. PRADT,
Assistant Attorney-General.

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Clerk.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, Appellant,

vs.

EVETT D. NIX.

and

No. 195

EVETT D. NIX, Appellant

vs.

THE UNITED STATES.

Appeals from the Court of Claims.

BRIEF FOR EVETT D. NIX.

FRANK B. CROSTHWAITE
AND
FRANKLIN H. MACKEY,
For Evett D. Nix.

HILARD, LAW PRINTER, 615 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

Filed July 25, 1901.

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

Filed November 23, 1901.

CROSS-APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR EVETT D. NIX.

Statement of the Case.

The case is here upon cross-appeals. The United States has appealed from a judgment of $108.95, rendered in behalf of the claimant on items 2 and 16 of Finding 111 (record, p. 5). The claimant appeals from the disallowance by the Court of Claims of all the other items of his

account. The claimant, Evett D. Nix, was United States Marshal for the District of Oklahoma from July 1, 1893, to February 24, 1896, duly appointed and qualified, (Finding 1, p. 3). During said period the claimant as such marshal, by his deputies, performed services and travel, and incurred expenses in behalf of the United States, and his accounts therefore, duly verified by his oath, and approved by the court in accordance with law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, and part thereof disallowed. (See Finding No. 11.) Claimant thereupon brought this action April 3, 1897, in the Court of Claims to recover judgment for the items disallowed. After the filing of the petition certain items of the account were conceded by the Government's counsel, and thereupon a motion was made to sever the cause of action and to file two separate petitions, one to cover all items not contested by counsel for the Government, and the other to cover all the contested items. This motion was allowed and thereupon claimant filed two separate petitions with the first of which—that covering the uncontested items—we have nothing to do; to the second, however—that covering the contested items—this appeal refers.

It will be observed that the claimant's petition (Rec. pp. 1, 2) sets forth the *total* of the items claimed by him as $5,434.95. There was allowed by the Court of these items only, $108.95, leaving a total of $5,326 disallowed, which is the amount in controversy on these appeals.

The appeal of the United States goes only to the allowance to the claimant of two items, viz., "Nos. 2 and 16 of Finding 111" (Rec.5) the sum total of which is $108.95. As to the first of these items the claimant contends that the allowance was rightly made. Sec. 829 R.

S. provides a mileage to the marshal "For travel in going only to serve any process, warrant, attachment or other writ * * * six cents a mile to be computed *from the place where the process is returned to the place of service.*" The claimant has charged exactly in accord with the statutory provisions, computing the distance by the unavoidable circuitous routes traveled. The law does not require the distance to be computed "as the crow flies" from point to point. The account has been approved by the District Judge "in accordance with law" as stated by the finding. This approval, as held in the cases below cited, is *prima facie* evidence of its correctness and in the absence of clear and unequivocal proof to the contrary, it should be conclusive.

Jones *vs.* United States, 134 U. S., 483, 488.
United States *vs.* Pointer, 140 U. S., 163.
United States *vs.* Barber, 140 U. S., 179.
United States *vs.* Harmon, 147 U. S., 268.

So with the 16th item, indeed so with all the items of the account, the claimant starts off with the force of this approval by the District Judge as vouching for their *prima facie* correctness; and until therefore, there be, something in the finding to impeach the certificate of the District Judge, the mere disallowance without more cannot be upheld.

This disposes of the defendant's appeal.

The Cross-Appeal.

It remains now to deal with the items of the account disallowed by the Court of Claims, and from which action the claimant has taken a cross appeal.

Assignments of Error.

The appellant in the cross-appeal assigns the following errors of the court below.

1. The said court erred in failing to find, as requested by the claimant (cross-appellant) the number of miles traveled by the claimant, his deputy and prisoners and guards, for which he claims compensation as set forth in item 12 of his third request for findings of fact. If the number of miles traveled was not as stated by appellant, viz. 51,355 miles in his said request the court should have stated in its finding what was the correct number.

2. The said court erred in not allowing ten cents a mile for at least *some* distance traveled, it being evident from said item 12 of the court's third finding of fact that the claimant, his deputy and prisoners and guards traveled *some* distance whatever it was.

3. The said court erred in disallowing item 10 of the third finding of fact.

4. The said court erred in disallowing the 24th item of the third finding of fact.

Let us first deal with the largest item, viz. No. 12 of Finding 111. We are here confronted at the outset with what this court in United States *vs.* Clark, 94 U. S., 73, has termed "an insufficient finding." In the event, therefor, of this court believing this imperfection to be material, the case must be remanded for further proceedings. In the case just above cited, the court, through Mr, Chief Justice Waite said, "Upon the facts set forth in the special finding this judgment cannot be sustained, because of the omission to state the amount of the loss. As in our action upon the appeal we do not look beyond the finding the judgment must be reversed on account of an insufficient finding, and the cause remanded for further proceedings as law and justice may require."

So in Mahan *vs.* the United States, 14 Wall., 109, it was held that "if the Court of Claims refuses to find as prayed, the prayer and refusal must be made part of the record [which we have done in the case at bar]. The remedial purpose of this rule is that when a party has in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding."

Now the claimant at bar in his petition, as well as in his request for findings, sets out this item 12 with the necessary particularity. He gives the total amount of miles traveled as 51,355, and charges at the rate of ten cents a mile, (the admitted rate), thus making his claim $5,135.50. The finding of the Court of Claims, however, notwithstanding the claimant's specific request that the court find the number of miles traveled, fails to say how many miles were traveled, but merely states that on this item the accounting Officers of the Treasury disallowed $1,143.30. If the finding had stated what were the number of miles traveled, then this court, knowing the legal rate of mileage, would know, "as a conclusion of law," just how much the claimant would be entitled to receive. But it does not enlighten the court so as to enable it to say whether the allowance was right or wrong merely by informing it that the amount was "for transportation of prisoners." The court must know what distance these prisoners traveled, and then it will follow as a conclusion of law, what the claimant should have been allowed. Surely, nothing could be more vague and insufficient than the finding in question. Had the court found, as we requested it to find, namely, that the number

of miles traveled were 51,355, then it is plain that we should have been allowed $5,135.50, unless there be something in the finding to sufficiently impeach the effects of the approval of the item by the District Judge. There are two special reasons, therefore, why the number of miles traveled should have been found. First, it would at once without further inquiry, have shown the amount in controversy. Second, it would enable this court to ascertain "as a conclusion of law," the amount due the plaintiff.

The finding, it is true, does show the amount the accounting officers disallowed, but how is this court to know whether this disallowance was right or wrong until it knows, as we have said, the number of miles which the claimant or his deputies and prisoners traveled. The finding states the amount disallowed to have been $1,143.30. For how much travel was this disallowance made? It may have been because we claim pay for 11,433 miles more than 51,345 miles for which latter sum, for all that this finding shows, we may have been allowed. Or again it may have been that we claimed for only 11,433 miles and were not allowed anything upon the claim. It is evident however from this finding that the claimant traveled *some* distance, and that he was allowed *nothing* for that distance whatever it was. When therefore, we ask that the cause be remanded because of the insufficiency of this finding, we surely have not asked for what we are not entitled to.

But let us suppose that the court had found the number of miles traveled to have been as stated in the claimant's request for finding, viz. 51,355, then before the claimant can recover at the rate of ten cents a mile for this distance there still remains the question whether he is entitled to mileage *at all* for transporting the prisoners "from the several places of arrest for a hearing before the United

States Commissioners whose offices were nearest the places where the crimes were committed, instead of bringing the prisoners before the commissioners whose offices were nearest the places of arrest."

The answer to this question involves the determination of an alleged conflict of law. The provisions of the Act of Congress entitled "An Act to provide a temporary Government for the Territory of Oklahoma, approved May 2, 1890, 20 Stats. at Large, 87, Sec. 10, reads as follows: "Persons charged with any offense or crime in the Territory of Oklahoma and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies wherever found in such Territory, but in all such cases, the accused shall be taken for preliminary examination before a *United States Commissioner* or a justice of the peace *whose office is nearest to the place where the offense or crime was committed.* By a later act (August 18, 1894) Congress has provided that, "It shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offense to take the defendant before *the nearest Circuit Court Commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial,* * * * and no mileage shall be allowed any officer violating the provisions hereof." (28 Stats. at Large, p. 416.)

There are not now, nor have there ever been any "Circuit Court Commissioners" in the District of Oklahoma since the Act of May 2, 1890, which specifically designates such United States Officers as "United States Commissioners."

In the case at bar the marshal brought the prisoners, as stated by item 12 of the Third Finding of fact, "from the several places of arrest for a hearing before United

States Commissioners whose offices *were nearest the places where the crimes were committed by the prisoners*, instead of bringing the prisoners before the commissioners whose offices were nearest the places of arrest." In other words, the claimant obeyed the Oklahoma or special statute, instead of the later or general statute. Was he correct in doing so? Let us examine the authorities.

> "The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special cases are applicable."
> Magone, Collector, *vs.* King, 51 Fed. R., 525, 526.

> "It is an established rule, on the construction of statutes, that a subsequent statute, treating a subject in general terms, and not *expressly* contradicting the provisions of a prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning."
> State *ex rel.* Fosdick *vs.* the Mayor, 14 Ohio St. 420.

> "The rule is that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."
> Churchill *vs.* Crease, 5 Bingham, 177.

> "Where a general law and a law which applies only to a limited district come in conflict, the general law yields to the special, and this without regard to its being posterior in date, for a general

regulation of any subject-matter, as the assessment of taxes, or laying out of roads, will not change or repeal by implication the power before conferred on particular municipalities; such repeal must be made by express words. So held in a case where the charter of a city conferred on the municipal government the right to lay out streets and highways in a manner *different* from the mode prescribed by the *general* law of the State, the State law being held suspended within the limits of the city."

The State *vs.* Clark, 25 N. J. Law, 54.
See also State *vs.* Trenton, 38 N. J. Law, 64 to same effect.

"The well settled rule of construction, where contrary laws come in question is that the law general must yield to the the law special." Noy's Maxims.

It was upon these principles that the court in Townsend *vs.* Little, 109 U. S., 504, held that, "specific and general statutory provisions may subsist together, the former qualifying the latter." In that case a Territorial Act, under which a deed of real estate was made to A by the mayor, directed that "Deeds of Conveyance of the same shall be executed by the mayor of the city or town, under seal of the corporation." A general Act of the Territory at the time the deed was made, required deeds to be *witnessed*. The deed to A bore the corporate seal, as required by the special Act, but was not witnessed. Held, that the special Act controlled the general Act, and that the deed was good.

Townsend *vs.* Little, 109 U. S., 504, citing among others London, etc., Railway *vs.* Wardsworth Board of Works, Law Rep., 8 C. P., 185.
Bishop on the Written Laws, Sec. 112a.

We submit, therefore, under the authority of the foregoing citations, that when a Federal statute declares that, "Persons charged with any offense or crime *in the Territory of Oklahoma*, for whose arrest a warrant has been issued," etc., shall be carried by the United States Marshall to a certain place, these directions must be obeyed, by the U. S. Marshal for Oklahoma instead of the different directions of a general statute in which Oklahoma is not specifically named. In other words, the provisions of the statute applying specifically to Oklahoma must be regarded as an exception to the general statute. See also the opinion (unreported) of Judge McAtee, District Judge of the Fifth Judicial Circuit of Oklahoma, where it was held that not only must the warrant of arrest issue by, but the prisoner must be broughtto the U. S. Commissioner nearest the place where the crime or offence was committed. The opinion will be found in the appendix to this brief

If we are right in this contention, then it is perfectly apparent that the accounting officers of the Treasury Department were in error in disallowing the claim of the claimant upon this item ; and just at this point we may begin to see even yet clearer how the claimant is hampered by the failure of the Court of Claims to find the number of miles traveled by the claimant in executing his writs of arrest. Had that been done this Court could at once see the exact amount to which the claimant is entitled, without resorting to the petition. We submit, therefore, that upon this item the Court should either remand the cause with directions to ascertain the number of miles traveled and to allow the statutory rate of ten cents per mile, or, else, adopt the undisputed and indisputable fact that the account of the claimant was approved by the Court for 55,134 miles of travel, which fact, as we have shown, is *prima facia* evidence

of the distance traveled when there is nothing in the record to show to the contrary, and then remand the case with directions to allow this item as claimed by the claimant.

There remains to be considered two other items of the third finding, which were dissallowed, viz. items 10 and 24.

Item 10, $100.

This item was "for attendance of the marshal at court by deputy for twenty days at $5 per day, $100." It was found by the Court of Claims that "the court was opened for business [on the days charged for] by order of the judge;" and the item seems to have been disallowed, because "it does not appear whether business was transacted on said days" and also because "it does not appear that the judge was present at court on any of those days." It is respectfully submitted that since the approval of the account "according to law" by the judge of the Oklahoma Court was *prima facie* evidence of all the facts necessary to be shown in order to obtain that approval it is not incumbent on the claimant to make it "appear" before the accounting officers of the Treasury, or the Court of Claims, that either the judge was present, or business was transacted on the days for which the account was approved; if it be material and permissible to show the contrary, that duty is on the defendant; the claimant has done all he is required to do when he shows that his accounts were "approved according to law" by the District Judge. Claimant stands upon that approval as *prima facie* evidence of its correctness, and is not required to make it appear (otherwise than by the approval itself) that those things existed without which the approval could not have been made "according to law."

Jones v. United States, 134 U. S., 483,488.
United States v. Barbour, 140 U. S., 179.
United States v. Harmon, 147 U. S., 282.

Item 24, $90.50.

This was an actual expense account paid by the claimant to his deputy, covering railroad fare, etc,, of the deputy, prisoner and guard, as declarded by the finding itself, " for transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn. New York, under a warrant of commitment. The warrant of commitment was was issued at Oklahoma, and the marshal transported the prisoner on that warrant to Springfield, Ohio, where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged, as a witness in that case at Springfield, the marshal continued his transportation from Springfield to New York City on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York City too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York, and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. *The marshal made every effort to retake the prisoner and failed.*"

We submit that the same rule with respect to the prima facies of an account, when approved by the District Judge, which was applied in Jones vs. the United States, *supra*, and the cases there cited, (see supra item 10) applied to this claim. The expense account was apparently disallowed because the prisoner escaped. No law can be found where such a penalty is applied to an officer under the circumstances set forth. If the marshal

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is liable on his bond for being derelict or carelesss in the performance of his duties (a fact which the finding negatives) there is a proper course to pursue under the law, but there is no provision which allows the accounting officers to arbitrarily disallow the expenses actually and necessarily incurred and paid.

This concludes the brief upon the correctness of the items of the claimants claims.

Jurisdiction.

It may be intimated, however. that this court is without jurisdiction to consider any of the items except those embodied in the appeal of the United States. If this position be taken we desire to present the following considerations, upon this question.

1st. The principal appeal and the cross-appeal are to be taken as one appeal. It, of course, cannot be disputed, that the court has jurisdiction of the government's appeal, since there is no limit placed by the law upon the *amount* involved when an appeal is taken by it from the Court of Claims. Having, then, jurisdiction of that appeal, it has also jurisdiction of the cross-appeal. This has been held by this court in the case just below cited to wit:

> "Where the appeal is from a decree sufficient in amount to give the Court jurisdiction [and the Government's appeal is sufficient in amount to give jurisdiction] a cross-appeal will not be dismissed, although it is from a decree awarding against the defendant below less than that amount, as the appeal *opened the whole controversy in this Court.*"
>
> Walsh *vs.* Mayer, 111 U. S., 31.

In that case the Court by Mr. Justice Matthews said:

> "We have disposed of the case upon both ap-

peals. The motion to dismiss the cross-appeal of the defendant below, for want of jurisdiction on the ground that the amount in controversy is less than $5,000, is overruled. The cross-appeal, it is true, is from a decree awarding against defendants below less than that amount, and it could not, therefore, be maintained by itself; but the appeal of the plaintiffs below, to which it is incident, *opened the whole controversy here*, so far as they were concerned, and that of the defendant must be allowed to have the like effect as to them, so that upon both appeals the case was brought up *as it stood for hearing in the court below*, the claims of the respective parties involving the question of liability as to the whole amount."

It will be observed that the claimant brought his action in the Court of claims to recover $5,434.95, *as set forth in his petition.* He has been disallowed by the Court below the whole of this sum excepting $108.95. Is not then the amount in controversy over $3,000? Is it not, in fact, over $5,000?

"This court has jurisdiction of a writ of error, or an appeal by the plaintiff below when he *sues for* as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit for which he failed to get a judgment or degree.

Hilton *vs.* Dickinson, 108 U. S., 165.
Scott *vs.* Lunt, 6 Pet. 349.
Knapp *vs.* Banks, 2 How. 73.
Walker *vs.* U. S., 4 Wall. 163.
Rodd *vs.* Heartt, 17 Wall, 354.
Dows *vs.* Johnson, 110 U. S., 223.

An *allegation in the declaration* of damages generally fixes the amount of value for the purpose of jurisdiction.

Ryan *vs.* Bindley, 1 Wall. 66.

So in a suit for property *plaintiff's averment* of value determines the amount in controversy.

Bennett *vs.* Butterworth, 8 How. 124.

Again, the jurisdiction of this court attached to this case when the Government appealed. On that appeal, where a cross-appeal is taken, the *whole case is opened*, as was said in Walsh *vs.* Mayer, *supra*. The Jurisdiction, therefore, having once attached, cannot be taken away by a change in the value of the subject of controversy.

Cook *vs.* U. S., 2 Wall. 218.

An analogous case is that of Ellis *vs.* Harrison, 104 Mo., 280, where the Supreme Court of that State has jurisdiction when the amount in controversy exceeds $2,500. In the case referred to it was held that "In a case where one judgment embodies a finding against plaintiff as to three counts of the petition involving more than $2,500 and against the defendant as to the fourth count involving less than that sum, *both parties appealing*, the Supreme Court has jurisdiction to determine both appeals under the constitution of Missouri. Art. 6, Sec. 12, citing U. S. *vs.* Mosby, 133 U. S., 273.

If, on the other hand, the court be of opinion that the case at bar has not been brought within the application of the foregoing authorities, because the findings of fact fails to show with certainty the amount in controversy owing to the insufficiency of Finding 111, Item 12, then we ask the remanding of the cause for the reasons and upon the principle stated when that question was being discussed by this brief, *ante* pages 4–5.

Respectfully submitted,

FRANK B. CROSTHWAITE.

FRANKLIN H. MACKEY,
Of Counsel.

For Cross-appellant.

APPENDIX.

IN THE DISTRICT COURT FOR GRANT COUNTY, FIFTH JUDICIAL DISTRICT OF OKLAHOMA.

UNITED STATES OF AMERICA *Plaintiff*,
vs.
JOSEPH GAUTIER, *Defendant*.

Opinion of Judge McAtee.*

This is a criminal proceeding begun in Logan County, in the First Judicial District of this Territory, and brought to secure the punishment of the defendant for an offense against the laws of the United States, which is charged to have been committed in Grant County, in the Fifth Judicial District of this Territory.

An affidavit was made upon the 6th day of June, 1895, by one Edward Taylor, before one J. T. Saunderson, a Commissioner of the District Court of the United States for the First Judicial District of Oklahoma, in which it was charged by the affiant that on the 24th day of May, 1895, in Grant County, Oklahoma, in violation of section 5388 of the Revised Statutes of the United States, the defendant "did unlawlully, willfully and feloniously cut, remove, destroy and dispose of standing and growing timber upon government land," contrary to the said statutes.

Thereupon the said commissioner in Logan County, of the First Judicial District of this Territory, issued his warrant to the Marshal of the United States, and to his deputies or either of them, in which it was recited that the said Taylor had made his "complaint in writing under oath before him, the said Commissioner of the District Court for the First Judicial District of Oklahoma, charging" that the said defendant committed the offense above specified.

*This opinion is not cited in the brief, because it is unreported, but a certified copy of it is filed with the papers and we therefore print it as an appendix. It will be seen that the United States Marshal in the case at bar followed the ruling made by the learned judge delivering the opinion in this case and took his prisoners to the U. S. Commissioner nearest the place where the crimes or offenses were committed.

Thereupon and by ths said warrant the said commissioner undertook to command the said marshal and his deputies in the name of the President of the United Statee, to "apprehend the said Joseph Gautier and bring him forthwith before me or any other commissioner having jurisdiction of said matter to answer to the said complaint that he may then and there be dealt with according to law, for said offense."

Thereupon by virtue of said paper, purporting to be a lawful warrant, on the 13th day of June, the United States Marshal, arrested the said Joseph Gautier in Grant County, and brought him before a United States Commissioner for the Fifth Judicial District at Pond Creek. in Grant County, upon said criminal charge; whereupon the defendant was held to appear before the District Court of the United States for the Fifth Judicial District to be held in Grant County at the next regular term of said court, but was admitted to bail.

Afterward a formal complaint; based upon these proceedings was filed against the defendant in open court September 10th 1895.

The case comes on to be heard upon the motion made by the defendant's attorney, A. M. Mackey, Esq., to quash the information: (1) because the proceeding is void, and (2) because it is not instituted according to law.

The question is one of the greatest practical importance in this Territory. It has been the common practice of the United States commissioners of the Fifth Judicial District to receive affidavits of the character mentioned in this case, and to issue warrants thereupon for the arrest of persons upon similar charges to many counties in the western portion of the Territory. If the practice is justified by the law, it permits the institution of criminal proceedings, of proceedings for the punishment of offenses

against the laws of the United States in counties other than that in which the offense was committed. A defendant then may be arrested in Woods County upon an accusation made before a United States commissioner in Logan County, more than 150 miles from the place where the offense is charged to have been committed, or in Roger Mills County, more than 200 miles from the place where the accusation is made, and from where the order of arrest was issued.

It is provided by Section 10 of the Organic Act of this Territory, page 44 of .he Statutes of 1893, that:

> "All offenses committed in said Terriority, if committed within any organized county, shall be proseuted and tried within said county."

The trial is a part of the prosecution, and no officer exercising judicial functions, would undertake to conduct the trial of the accused person outside of the county within which the offense is charged to have been committed.

Neither can the affidavit or information for the purpose of procuring a warrant to issue, which is made by the complaing witness, be made and the warrant issued thereupon by the commissioner. directing the arrest of the person who is charged with the offense, he issued outside of the county where the offense is alleged to have been committed, unless it is held that these measures are themselves no part of the prosecution.

This contention cannot be sustained. The prosecution includes every step by which, in pursuance of the method described by law, an individual is sought to be separated from the mass of his fellew citizens, and made the subject of a charge for a criminal offense for the purpose of ascertaining the truth of the charge, and securing the punishment of the accused.

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The very initial step of swearing out the warrant, including both the affidavit made by the accuser and the judicial step of ordering the arrest of the accused by the United States Commistioner, are a part of the prosecution.

It is impossible to hold otherwise. The defendant is held in this court upon an accusation made in the name of the United States of America, upon an information for cutting government timber in violation of the federal statute. That information is based upon the fact that the defendant was held by the United States Commissioner for Grant County to "personally appear before the District Court of the United States * * * then and there to answer the charge of committing the offense of cutting, removing, destroying and disposing of standing and growing timber upon government land." That holding of the the United States Commissioner for Grant County was based upon the affidavit of Edward Taylor made before the "Commissioner of the District Court for the First Judicial District of Oklahoma," in Logan County. Without the affidavit of Taylor and the warrant issued by the UnitedStates Commissioner for the First District of Oklahoma, this arrest would not have been made and the prosecution not have been begun.

His affidavit, which is the information laid for the purpose of causing the issuance of the warrant, is therefore up to this point, the most important step in this proceeding, and is an integral part of the prosecution.

Prosecution is defined in Webster's dictionary to be :

> "The institution of commencement and continuance of a criminal suit ; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information."

It is the "act of conducting any judicial proceeding and also the proceeding itself," and it includes everything done or performed by any court or judicial officer touching the rights of parties.

Anderson's Law Dictionary.

Flournoy *vs.* Jeffersonville, 17 Ind., 173.

And it was held by this court in the case of the United States *vs.* Duncan and others, in which the defendants were arrested in Grant and Garfield counties and brought before the court at Kingfisher, in Kingfisher county, in July of 1894, that:

> "It is therefore clear that if I act as a committing magistrate, I must go into the county where the alleged offenses were committed, and there sit to have the hearing of these cases, for the very institution of the suit—the making of the complaint, the issuance of the warrant of arrest of the defendants and their appearance for preliminary examination, are in fact a part of the prosecution.
>
> "It is held otherwise in behalf of the plaintiff here, and it is contended that 'prosecution' begins only with the actual trial. But I do not doubt that the very first step taken to abridge the liberty of any individual by legal proceedings against him to secure his punishment under the law for a crime, is a part of the 'prosecution.' The authorities which I have been able to find upon this subject state that 'prosecution' is the 'means adopted to bring the supposed offender to justice and punishment by due course of the law. In this country the means are by indictment, by presentment, by information and by complaint."
>
> Bouv. Law Dict., vol. 2, p. 389.
>
> State *vs.* Williams, 34 La., An. 1198.

> "The mode of prosecution is by indictment, presentment by grand jury, by coroner's inquest and by information."
>
> 1 Chitty's Crim. Law, pp. 132–134.
>
> "A prosecution is the institution or commencement of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing him to final judgment on behalf of the state or government, as by indictment or information."
>
> Burrell's L. Dict.
> Schulte *vs.* Keokuk Co., 37 N. W. Rep.

There is reason why the law is as it is. The weight of a criminal prosecution in which the government appears, accusing a citizen for the commission of a criminal offense, should not be borne among strangers, but among those who surround the locality of the crime which is sought to be punished, and who may know something of the offender whom the government seeks to bring to justice. The defendant has a right to demand that he should sustain the weight of a criminal accusation only in his own neighborhood *or where the offense was committed*, and among those who know him, and where all the human motives of personal and neighborhood interest are in full force, both in order to protect those whom the alleged violation of the law has injured, as well as for the protection of the supposed offender. There are United States commissioners, as well as a United States Court, within Grant County, and while the trial for the offense committed in Grant County must be held in the District Court of Grant County, so also the prosecution must begin and be carried on before the United States commissioner of Grant County, up to the time of the filing of the complaint and the trial of the cause in the

District Court, and for the same reasons. And, doubtless, the provision of the Organic Act is founded upon the right of the defendant as founded in natural reason and justice.

There is no reason why these informations for arrest should be taken out of the Fifth Judicial District, where the information of the offense exists, if it in fact exists at all, and into the First Judicial District, and from Grant County into Logan County, and away from the jurisdiction of the United States commissioner, of Grant County, who has the lawful jurisdiction, to the United States commissioner of Logan County, who has no jurisdiction in the matter, except with the object of procuring warrants to be issued with a readier facility by causing affidavits to be made before a United States commissioner, who has neither residence, knowledge, personal interest or jurisdiction in the county to take any step in the prosecution outside of the county where the offence is charged to have been committed.

The case now before the court is but one of a very large number of similar cases in which the United States commissioners of Logan County, in the First Judicial District, have for a long time persistently grasped jurisdiction which does not exist in them, to hear affidavits and informations for arrest; and in which they have issued warrants for the arrest of persons to many of the counties in this Territory, among whose people they could not reside, for the preservation of whose interests and for the control of whose actions they have not been appointed, in whom they can have but little interest, with whom they have no sympathy, to whom they are in no sense answerable, for whose welfare they manifest no concern, and over whom the law gives to them no lawful authority.

The motion to quash the information is sustained, for

the reason that it is based upon an affidavit and information for the issuance of a warrant which are void and without authority, and not capable of sustaining the subsequent steps in this prosecution.

TERRITORY OF OKLAHOMA, } ss.
Garfield County. }

I, C. F. McElrath, Clerk, District Court, in and for the County and Territory aforesaid, do hereby certify that the above and foregoing is a true copy of the decision of the court in the above entitled cause.

Witness my hand and the seal of said court, hereto affixed at my office in Enid, this 22d day of November, 1902.

C. F. MCELRATH,
Clerk District Court.

By PEARLE BEAUCHAMP,
Deputy.

[SEAL.]

FILE COPY.

JAN 2 1903

JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

AND

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR EVETT D. NIX IN REPLY TO THE BRIEF FOR THE UNITED STATES.

FRANK B. CROSTHWAITE,
For Cross-appellant.

FRANKLIN H. MACKEY,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5379

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THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Brief for Evett D. Nix in Reply to the Brief for the United States.

In replying to the brief for the United States, we desire to call the attention of the court to a controlling circumstance affecting each of the items of the claimant's account, a circumstance which does not seem to be taken cognizance

of by the learned counsel for the Government, namely, that the act of May 2, 1890, cited in our principal brief as the organic act of the Territory of Oklahoma (26 Stats., 81), in express terms makes the fee bill for United States marshals, as it is found in section 829 of the Revised Statutes, the fee bill for the marshals of Oklahoma. That act, after providing for the creation of the Territory of Oklahoma from part of the Indian Territory, vests the judicial power of the new Territory in "a supreme court, district courts, probate courts, and justices of the peace." It divides the Territory into judicial districts and provides that "a district court shall be held in each county in said district thereof * * * and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States." Appeals and writs of error are given from these district courts to the supreme court of the Territory, and from the latter court to the Supreme Court of the United States. Section 13 of the same act then provides that "there shall be appointed a person learned in the law, who shall act as attorney for the United States, who shall hold his office for four years and until his successor shall be appointed," &c.; also that "there shall be appointed a *marshal* for said Territory, who shall hold his office for four years and until his successor shall be appointed," &c. It then declares that "there shall be allowed to the attorney, *marshal*, clerks of the supreme and district courts *the same fees* as are prescribed for similar services by such persons in chapter sixteen, title Judiciary, of the Revised Statutes of the United States." This chapter includes section 829—the fee bill for United States marshals; thus making this section of the Revised Statutes a part of the organic act of the Territory. If, therefore, our contention as to this section be well founded (as we contend it is), then *every item* of the claimant's account should be allowed without further question,

for they are each and all of them made up and charged for according to the provisions of section 829 of the Revised Statutes, as the same was put in force and made a part of the organic act of Oklahoma on the 2d of May, 1890.

We now proceed to reply seriatim to the contention of the learned counsel for the United States in respect of the several items in controversy upon the appeal and cross-appeal.

Item 2—$69.18 (Rec., 3).

It is contended by the Government as to this item that by the 25th clause of section 829, Revised Statutes, "the mileage is to be computed not for the distance which the marshal *may find it necessary to travel* in going to serve the process, but is to be computed from the place where the process is returned to the place of service." We submit that this contention cannot be upheld. The act of 1875 (18 Stats., 333, ch. 95, §§ 1, 7), which provides for the allowance of mileage to clerks, marshals, &c., for travel "necessarily performed," throws some light upon the subject if any further light be needed, for we insist that the word "travel" in this clause of section 829 is to be construed as meaning "necessary travel." (See Gould's Notes to Revised Statutes, vol. 1, p. 248, and for these sections of the act of 1875 see *ibid.*, p. 243.) The finding of fact by the Court of Claims as to this item declares that "the defendants were moving about from place to place to avoid arrest, and it was NECESSARY *to travel a circuitous route.*" Nor does the act of 1894 (28 Stat., 372), even supposing it to supersede the special provisions of the Oklahoma organic act, in any way change this provision as to travel "*necessarily* performed," as claimed by the learned counsel. That act, after making provisions for their pay, annexed a proviso that "hereafter no marshal or deputy marshal be allowed more than one mileage for each mile *actually and necessarily* performed," showing that when "actually and necessarily performed" the mileage should

be allowed; and that was all that the court below did in the case at bar. It found that this travel had been "actually and necessarily performed," and consequently allowed this item.

Item 10—$100 (Rec., 4).

This item is conceded us in the defendant's brief. In addition to the holding by this court, as expressed in the headnote to the case of United States *vs.* Pitman, 147 U. S., 669, viz., "Marshals are entitled to per diem fees for attendance when attending under sections 583, 584, 671, and 2013, Revised Statutes, the same as if the judge were present and business were transacted," and the like ruling in United States *vs.* Finnell, 185 U. S., 236; a similar ruling was made in United States *vs.* Aldrich, 58 Fed. Rep., 668.

Item 12—$5,135.50 (Rec., 4).

We come now to consider the position taken by the defendant as to this item. We submit that it is entirely untenable. Apart from our contention, upon general principles, in our main brief, that the provisions of the Oklahoma organic act upon this subject are special provisions and cannot be held to be repealed by any subsequent general act of Congress unless the Territory of Oklahoma be expressly mentioned therein, we submit that the contention by the learned counsel for the defendant that the fees of the marshal for serving warrants are to be paid for in one manner if the arrest be made for an offense against the Territory, and in another if against the United States, and that the marshal or his deputy is to carry the prisoner in one direction or another, according as the offense for which he is arrested is against the Territory or the United States, finds no support from the statute itself. The statute makes no distinction whatever. On the contrary, it declares that "persons charged with *any* offense or crime [whether the

same be against the Territory or the United States], for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies wherever found in such Territory, but in *all* such cases [not in any particular class of cases, as contended for by defendant's counsel], the accused *shall* be taken for preliminary examination before a United States commissioner or a justice of the peace *whose office is nearest to the place where the offense or crime was committed.*"

That is to say, that whenever the accused is arrested "*by the United States marshal or any of his deputies*" he shall in *all such cases* be taken, &c. This, therefore, is an express special provision for the marshals for the Territory of Oklahoma, and it cannot be said to be overruled by the general provision of a later act unless that Territory is in terms expressly included.

In addition, however, to the rule of law that a special statute is not to be considered as repealed by a general statute, there is an express provision of the organic act which controls this question. By section 28 thereof it is declared that "the Constitution and all the laws of the United States not locally inapplicable shall, *except so far as modified by this act*, have the same force and effect as elsewhere within the United States." So that the general act of 1894 must be considered as modified by the Oklahoma provision, so far as that Territory is concerned.

Lastly, even if we consider the question as if this provision of the organic act had never been passed and regard the act of 1894 as controlling the subject, yet even by that later statute these fees must be allowed, for the act of 1894 declares that after the arrest has been made the marshal shall take the defendant before the nearest circuit court commissioner or the nearest judicial officer *having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial.* Now, it has been held by Judge McAtee in the case printed in the appendix to our principal brief that the commissioner

or judicial officer having exclusive jurisdiction to hear, commit to bail, &c., is the commissioner or judicial officer nearest the place where the crime was committed. Had, therefore, the marshal taken the prisoners to the commissioner or judicial officer nearest the place where the arrest was made, that officer would have had no jurisdiction to commit the prisoners.

Item 24—$90.50 (Rec., 4).

This item, it is contended by the Government, cannot be allowed, because the prisoner "escaped from the custody of the deputy marshal;" but it should not be lost sight of that but for the interference of the Government itself at Springfield, Ohio, in detaining the prisoner "as a witness for the United States in a counterfeiting case," the deputy marshal might not have "arrived in New York city *too late* for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York." It was in consequence of that late arrival that "he escaped from the custody of the deputy on the night of the same day." Nowhere does it appear that the deputy was negligent in his duty whereby the prisoner escaped, but the finding of fact does show affirmatively that he "made every effort to retake the prisoner." It is submitted that the district judge's allowance of this item (which is a charge for actual expenses only) is *prima facie* evidence of the fact that the escape of the prisoner was not due to any negligent performance of his duties by the marshal, otherwise the district judge, who must be presumed to have satisfied himself of the fact, would not have allowed the item.

Respectfully submitted.

FRANK B. CROSTHWAITE,
For Cross-appellant.

FRANKLIN H. MACKEY,
Of Counsel.

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Supreme Court of the United States.

Nos. 142 and 195.—October Term, 1902.

The United States, Appellant,
vs.
142 Evett D. Nix.

Evett D. Nix, Appellant,
vs.
195 The United States.

On appeals from the Court of Claims.

[March 2, 1903.]

This is a petition for marshal's fees for the District of Oklahoma, upon which the Court of Claims made the findings of fact set forth in the margin.*

Mr. Justice Brown delivered the opinion of the Court.

Item 2 of the third finding, namely, "travelling 1,153 miles in going to serve warrants of arrest, at six cents per mile, $69.18," involves the question whether travel in excess of the distance from the place of service

*I. The claimant, Evett D. Nix, was United States marshal for the District of Oklahoma from July 1, 1893, to February 24, 1896, appointed, qualified and acting.

II. During said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, but a part thereof, as more specifically set forth in Finding III, was disallowed, and no portion thereof has been paid to the claimant.

III. Item 2. To travel, 1,153 miles in going to serve warrants of arrest, at six cents per mile, $69.18, being for travel in excess of the distance from the place of arrest to the place of receiving writs. The travel charged for was in a new and unsettled Indian country, without post offices, post routes or section lines. The defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route. The deputies had to find fordable places to cross the river to locate the defendants, there being no bridges. After arrest the defendants were taken by the most direct routes to commissioners for examination.

Item 10. For attendance of the marshal at court, by deputy, for twenty days, at $5 per day, $100.00.

It does not appear whether business was transacted in the court on said days,

to the place of receiving the writs can be allowed, in view of the fee bill for marshals. R. S. sec. 829, provides "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service." This has always been interpreted to mean by the usual travelled route, (*Hitch* v. *United States*, 66 Fed. Rep. 937,) the length of which is not given in the finding. The excuse for not pursuing the route in this case is that it was a new and unsettled Indian country; that defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route; and that, in the absence of bridges, the deputies had to find fordable places to cross the river to locate the defendants.

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although the court was opened for business by order of the judge. It does not appear that the judge was present at court on any of these days.

Item 12. This item was charged in claimant's accounts as transportation of prisoners, deputies and guards from the several places of arrest, for hearing before the United States commissioners, whose offices were nearest the places where the crimes for which the prisoners were arrested were committed. The number of miles charged in claimant's accounts for this travel was fifty-one thousand three hundred and fifty-five miles, at ten cents a mile, amounting to five thousand one hundred and thirty-five dollars and fifty cents.

Those accounts were submitted to the United States District Court for Oklahoma under the provisions of the act of February 22, 1875, (18 Stat. 333,) and the said accounts, including this item, as above charged, were approved by that court. When the accounts so approved were submitted to the accounting officers, all the charges for travel included in that item were disallowed by them under the provisions of the sundry civil appropriation act of August 18, 1894, (28 Stat. 372–416,) which made it the duty of the marshal to take the defendants before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial. Subsequently the accounting officers allowed and paid claimant of this item twenty-seven dollars.

After suit was brought in this court, the claimant's deposition was taken in respect to this item, and he proved that, of his own knowledge, eleven thousand four hundred and thirty-three miles were traveled in the transportation of said prisoners, deputies and guards. As to the remainder of the travel he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the Territory, and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. No other evidence was offered by the claimant to establish the number of miles actually traveled than the approval of the District Court for Oklahoma and his own deposition subsequently taken, as above stated. If the approval of his account by said District Court is competent evidence to establish the number of miles actually traveled, this court finds the ultimate fact that he traveled 51,355 miles. If such approval of the District Court is incompetent to establish the number of miles actually traveled, this court finds that the number of miles so

However equitable the charge may have been in this particular case, there is no authority of law for its allowance. There is, however, a special provision in the last clause of sec. 829, by which "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual travelling expenses, to be proved on his oath to the satisfaction of the court." This seems to contemplate the very contingency which arose in this case, of a number of miles actually and necessarily travelled in excess of the direct route from the place where the process was returned to the place of service. It reimburses the marshal his expenses but denies him a profit upon them. This item must be disallowed.

(2.) Item 10." For attendance of the marshal at court by deputy, 20 days at $5 per day, $100." The fact that it did not appear whether business was transacted in court on these days, or whether the judge was present in court, was immaterial, in view of the fact that the court was opened for

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traveled was 11,433 in the transportation of prisoners, deputies and guards, as before set forth.

Item 16. For service of a capias and transportation (mileage) of a deputy, prisoner and guard. The capias was issued by the clerk of the United States District Court at Topeka, Kansas, on an indictment found by the grand jury at Topeka The capias was received by the claimant in Oklahoma City and was executed by arresting the prisoner named in the capias, who was transported to the United States District Court at Wichita, Kansas.

The claimant charged six cents a mile for going sixty-two miles, from Oklahoma City to Perry, to serve the writ, $2 for the service of the writ, and ten cents per mile each for the deputy, prisoner and guard for 111 miles, $33.30, from Perry, Oklahoma, to Wichita, Kansas, and one meal for the prisoner, 75 cents, making a total of $39.77.

Item 24. For actual expenses for transporting a prisoner from Springfield, Ohio to the penitentiary at Brooklyn, New York, under a warrant of commitment. The warrant of commitment was issued at Oklahoma, and the marshal transported the prisoner on that warrant to Springfield, Ohio, where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged as a witness in that case at Springfield the marshal continued his transportation from Springfield to New York city on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York city too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York, and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. The marshal made every effort to retake the prisoner and failed, $90.50.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of one hundred and eight dollars and ninety-five cents ($108.95) on items 2 and 16 of Finding III.

All other items disallowed.

business by order of the judge. (*United States* v. *Finnell*, 185 U. S. 236; *McMullen* v. *United States*, 146 U. S. 360.) For ought that appears, the attendance may have been under the circumstances in which a similar charge was allowed in *United States* v. *Pitman*. (147 U.S. 669.) Where the court is opened for business by order of the judge, it is the duty of the marshal to attend, and there is no reason why he should not receive his per diem therefor as if the judge were actually present. This claim is not contested by the government, and should be allowed.

(3.) Item 12, for the transportation of prisoners arrested under warrants issued by United States commissioners, involves two questions: first, whether travel should have been charged from the place of arrest to the *nearest* Circuit Court commissioner, or to the office of the commissioner *nearest to the place where the crimes* with which the prisoners were charged *were committed;* second, whether, assuming the position of the claimant in this particular to be correct, as matter of law, there was sufficient evidence of the number miles travelled to entitle him to the charge of $5,135.50.

By "An act to provide a temporary government for the Territory of Oklahoma," (26 Stat. 81,) a certain portion of the Indian Territory was set off as a territorial government under the name of Oklahoma. By section 9 the judicial power of the Territory was vested in certain courts, and the usual executive and judicial offices created. By section 10, "persons charged with *any* offense or crime in the Territory of Oklahoma, and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies, wherever found in said Territory, but in *all cases* the accused shall be taken, for preliminary examination, before a United States commissioner, or a justice of the peace of the county, whose office is nearest to the place where the offense or crime is committed. All offenses committed in said Territory, if committed within any organized county, shall be prosecuted and tried within said county." By section 28, "the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States."

This is the act upon which the claimant relies for his right to travel, while, upon the other hand, the government contends that this act was repealed by a general act of August 18, 1894, (28 Stat. 372,) making appropriations for sundry civil expenses for the year 1895, one of the clauses of which, under the head of "Judicial," provides that "it shall be the duty of the marshal, his deputy or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the *nearest* Circuit Court commissioner or the *nearest* judicial officer having jurisdiction under existing laws, for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified

copy of the complaint, . . . and no mileage shall be allowed any officer violating the provisions hereof."

The object of this statute was manifestly to amend R. S. sec. 829, which provided that the mileage of the marshal for transportation of prisoners should be computed from the place where the process was served to the place where it was returned. This statute provides that he shall be taken to the Circuit Court commissioner nearest the place of arrest, regardless of the fact by whom the warrant was issued. Inasmuch as the later act is a general one, applicable to marshals generally throughout the country, we do not think it was intended to repeal or interfere with the former act, providing specially for persons charged with *any* offense or crime in the Territory of Oklahoma, and that in *all cases*, whether the crime was committed against the Territory or the General Government, the accused shall be taken before a commissioner, whose office is nearest to the place where the offense or crime was committed.

The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend* v. *Little*, (109 U. S. 504,) that special and general statutory provisions may subsist together, the former qualifying the latter. See also *Churchill* v. *Crease*, (5 Bing. 177;) *Magone* v. *King*, (51 Fed. Rep. 525, and cases cited;) *State* v. *Clark*, (25 N. J. Law. 54.)

It would seem that this construction works no particular hardship upon the government, since in all cases where the criminal is unable to give bail he is required to be ultimately transported for trial to the county wherein the crime was committed.

The second question connected with this item is whether the marshal produced sufficient evidence of the number of miles travelled. His claim was for 51,350 miles at ten cents per mile. He was unable to prove, of his own knowledge, more than 11,433 miles. As to the remainder he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the Territory, and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. He showed, however, that his accounts had been allowed by the district judge. That was sufficient to cast upon the government the burden of showing any error of fact in his account. (*United States* v. *Jones*, 134 U. S. 483.) In that case we held that the approval of the commissioner's account by a Circuit Court of the United States, under the act of February 22, 1875, (18 Stat. 333,) was *prima facie* evidence of the correctness of the items of that account, and, in the absence of clear and unquestionable proof of mistake on the part of the court, it should be conclusive. We adhere to that view. It would be an insupportable burden upon the officers of courts if, every time a ques-

tion was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute. Notwithstanding this, however, there is no doubt that the account may be impeached for error of law. (*McMullin* v. *United States*, 146 U. S. 360.) This item should have been allowed in full, less the amount paid.

(4.) Item 24. For actual expenses in transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant or commitment, is the only other one contested. The prisoner with a deputy and guard arrived in New York too late for the prisoner to be received at the Brooklyn penitentiary on the same day, and that night he escaped from the custody of the deputy while they were going to supper in the hotel where they were staying.

As there is no finding, either by the district judge in approving his accounts or by the Court of Claims of due diligence on the part of the officer to prevent the escape, the item was properly disallowed. The presumption is that he escaped by negligence. (*State* v. *Hunter*, 94 N. C. 829; *State* v. *Lewis*, 113 N. C. 622; *Shattuck* v. *State*, 51 Miss. 575.)

The judgment of the Court of Claims will therefore be reversed and the case remanded to that court for further proceedings in conformity with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.

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